(2)

Supreme Court, U.S.
FILED
MAR 19 2004
OFFICE OF THE CLERK

No. 03-1183

IN THE

# Supreme Court of the United States

BENJAMIN ENDRES,

*Petitioner*,

v.

INDIANA STATE POLICE,

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204
(317) 232-6201

*Counsel of Record

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Special Counsel
RAEANNA S. MOORE
Deputy Attorney General

*Counsel for Respondent*

## QUESTION PRESENTED

Petitioner, former Indiana State Police Trooper Benjamin Endres, was assigned duty aboard a casino boat. When he received that assignment, Endres demanded a different assignment based on his religious objections to gambling. The State Police refused this post-assignment, task-specific accommodation. When Endres refused to report for casino boat duty, the State Police terminated his employment for insubordination.

The question presented is whether, under these circumstances, it was reasonable under Title VII for Endres to demand a task-specific accommodation from having to protect activities and enforce laws that he finds religiously objectionable.

TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

STATEMENT ..... 1

REASONS FOR DENYING THE PETITION ..... 6

I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS FROM OTHER CIRCUITS ..... 6

II. THE SEVENTH CIRCUIT PROPERLY HELD THAT PETITIONER'S DEMAND WAS UNREASONABLE, AND THE ISSUE IS NOT OF PRESSING NATIONAL CONCERN ..... 10

III. THE PROCEDURAL POSTURE OF THIS CASE MAKES IT AN EXTRAORDINARILY POOR VEHICLE FOR CONSIDERING THE QUESTION PRESENTED ..... 14

CONCLUSION ..... 18

# TABLE OF AUTHORITIES

CASES: Page

*American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772 (9th Cir. 1986).....7

*Balint v. Carson City*, 180 F.3d 1047 (9th Cir. 1999).....6, 7, 9

*Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir. 1995)..... *passim*

*Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). .....16

*City of Boerne v. Flores*, 521 U.S. 507 (1997) .....16

*Employment Div. v. Smith*, 494 U.S. 872 (1990) .....3

*Endres v. Indiana State Police*, 794 N.E.2d 1089 (Ind. Ct. App. 2003)..... *passim*

*Endres v. Indiana State Police,* 334 F.3d 618 (7th Cir.), *reissued* 349 F.3d 922 (7th Cir. 2003) ..... *passim*

*Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27 (1993) .....15

*Miller v. Drennon*, No. 91-2166, 1992 WL 137578 (4th Cir. June 19, 1992) .....9

*Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998).....11, 13

*Ryan v. United States Dep't of Justice*, 950 F.2d 458 (7th Cir. 1991).....11

TABLE OF AUTHORITIES - Continued

CASES: Page

*Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).....6

*United States v. City of Albuquerque*, 545 F.2d 110 (10th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977).....8, 9, 10

*Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995).....12

*Yee v. City of Escondido*, 503 U.S. 519 (1992).....15

CONSTITUTIONS:

U.S. Constitution, First Amendment.....5

U.S. Constitution, Eleventh Amendment..... *passim*

U.S. Constitution, Fourteenth Amendment, § 5.....2, 15, 16

Indiana Constitution.....5, 17

STATUTES:

Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. 2000a *et seq.*:
Section 701(a), 42 U.S.C. 2000e(a).....14
Section 701(j), 42 U.S.C. 2000e(j)..... *passim*
Section 703(h), 42 U.S.C. § 2000e-2(h).....6

42 U.S.C. § 1983.....2, 3

IND. CODE § 4-33 *et seq*.....1

TABLE OF AUTHORITIES - Continued

RULES: Page

Sup. Ct. Rule 14.1(a).....15

## STATEMENT

This case is not worthy of Supreme Court review for all of the classic reasons: there is no conflict in the circuits with respect to the question presented; petitioner presents no argument that the issue is otherwise nationally significant; the Seventh Circuit decided the issue correctly; and the case presents an extraordinarily poor vehicle for resolving the question presented. On this latter point, in particular, not only does a lurking Eleventh Amendment jurisdictional issue obstruct the question presented, but before he filed his federal court claim, petitioner began pursuing a state tribunal reinstatement claim that has been unsuccessful in part because he failed to take advantage of reasonable accommodations that were available.

1. In 1993, the Indiana General Assembly created the Indiana Gaming Commission for the purposes of issuing riverboat casino licenses to private entrepreneurs and regulating those casinos. Ind. Code § 4-33 *et seq.* Because of the obvious need for police protection for these high-cash businesses and their patrons, the Indiana State Police entered into an agreement with the Gaming Commission concerning the means by which it would provide police protection at riverboat casinos. Pet. 3; Pet. App. C1-2, D2. The agreement provided that State Police Troopers would be cross-assigned the duties of Gaming Commission Agents, meaning that they would be required, for example, to certify gambling revenue, investigate complaints from the public about the gambling system, and conduct licensing investigations for the casinos and their employees. Pet. 3; Pet. App. A3.

2. According to his July 17, 2001, federal district court damages complaint (which alleged breach of contract and a violation of 42 U.S.C. § 1983 in addition to a Title VII religious accommodation claim, Pet. App. D1-4), Endres was assigned the duties of a Gaming Commission Agent in March 2000. Pet. App. D2. When Endres refused to report for this duty, the State Police fired him for insubordination. Pet. 4; Pet. App. D3. Endres claims that the State Police improperly failed to accommodate his religious beliefs when it refused to give him another assignment. Pet. 4; Pet. App. A3, B3, C2, D3.

The State Police responded to Endres' federal court lawsuit with a motion to dismiss the Title VII and breach of contract claims for lack of jurisdiction, arguing that Congress's attempt to abrogate states' Eleventh Amendment immunity for Title VII religious accommodation claims was invalid because it exceeded Congress's powers under Section 5 of the Fourteenth Amendment. Pet. 4-5; Pet. App. C2-3. The United States intervened solely to defend the constitutionality of the attempted abrogation. Pet. 5; Pet. App. A2-3, B2, C2-3. The district court denied the State Police's motion to dismiss the Title VII claim on Eleventh Amendment grounds, though it did dismiss the breach of contract claim. Pet. 5; Pet. App. C6-7.

The State Police then pursued an interlocutory appeal to challenge the district court's ruling on the Eleventh Amendment issue. Pet. 5; Pet. App. A3, B2. The Seventh Circuit determined that its duty to avoid constitutional issues where possible made it "prudent" to inquire whether the State Police had a duty to accommodate petitioner under Title VII before reaching the claim of Eleventh Amendment immunity. Pet. App. A4, B3-4. It then held that "Endres has made a demand that it would be unreasonable to require any police or fire department to tolerate" and remanded the case to the district court with instructions to enter judgment for

the State Police on the merits.[1] Pet. App. A7-8, B7, B17. The Seventh Circuit denied en banc review on November 19, 2003. Pet. App. A1. The district court formally dismissed the case on January 5, 2004. Respondent's Appendix (hereinafter "R. App.") 38a.

3. As mentioned above, but as petitioner fails even to acknowledge, before filing this Title VII case for damages in federal court, petitioner filed a reinstatement (and back pay) claim through a state administrative and judicial review grievance procedure that rests in part on the same asserted Title VII violation that he claims here. That state tribunal case has resulted in a published decision relating the circumstances surrounding petitioner's termination. *See Endres v. Indiana State Police*, 794 N.E.2d 1089 (Ind. Ct. App. 2003) (petition for transfer pending) (reprinted at R. App. 1a). This case is unworthy of review even apart from the facts developed in petitioner's unsuccessful state court proceedings, but those facts, set forth below, demonstrate that petitioner would have no viable Title VII claim even if the Seventh Circuit were reversed.

4. On October 12, 1999, petitioner's State Police Post conducted a lottery to determine who would serve as Gaming Commission Agents. R. App. 3a. Petitioner was the first to be chosen, though his formal assignment was not made at that time. *Id.* He immediately told his supervisor that his

---

[1] The Seventh Circuit also ordered dismissal of petitioner's Section 1983 claim on the combined grounds that the State Police was not a proper defendant under Section 1983 and that, in light of *Employment Div. v. Smith*, 494 U.S. 872 (1990), Endres had no prospect for success under Section 1983 in any event (and therefore should not be allowed to amend his complaint to name individuals as defendants). Pet. App. A9. The petition does not seek review of these determinations.

religious beliefs would not allow him to serve as a Gaming Commission Agent. *Id.* Petitioner's supervisor told him that he was not likely to have to serve because the Department expected to get a sufficient number of volunteers to fill the positions. *Id.*

The State Police's lottery system provided that a Trooper could avoid serving as a Gaming Commission Agent by requesting a transfer or a promotion for which he is qualified prior to the actual Gaming Commission Agent assignment being made. *Id.* A Trooper could also avoid such an assignment by soliciting a volunteer to take his place. *Id.* The day after conducting its lottery, petitioner's Post opened transfer requests for non-Gaming Commission Agent positions that stayed open for multiple weeks. *Id.* In addition, petitioner had passed the required tests for a promotion to the higher rank of Corporal, and the State Police had opened two Corporal positions. *Id.* State Police employees with the rank above Trooper did not have to serve as Gaming Commission Agents. *Id.* Petitioner neither requested a transfer nor applied for a position as Corporal. *Id.*

On March 2, 2000, some four-and-a-half months after learning that he had been chosen by lot to serve as a Gaming Commission Agent, petitioner received his actual assignment to the Blue Chip Casino beginning April 3, 2000. R. App. 4a; *see also* Pet. App. A3, B3, C2, D2. Petitioner quickly requested a meeting with the State Police Superintendent; he received one on March 13, 2000. R. App. 4a. During that meeting, petitioner explained that his religious beliefs would not allow him to be a Gaming Commission Agent in any form, not even by working on the docks or other locations near the boat such as hotel lobbies, lounges or parking lots. *Id.* He then requested another assignment. *Id.; see also* Pet. App. A3, B3, C2, D3. The Superintendent told petitioner that there were no exceptions to taking an assignment once it had been made. R. App. 4a. The Superintendent followed up

with a letter to petitioner making it clear that failure to report for the assignment would be an act of insubordination subject to investigation and possible disciplinary action. R. App. 4a-5a. When petitioner refused to report for duty at the Blue Chip Casino on April 3, 2000, the State Police began an internal investigation that resulted in his termination. R. App. 5a-6a; *see also* Pet. 4; Pet. App. A3, B3, C2, D3.

Petitioner filed a grievance with the Indiana State Police Board, but the Board, which held a hearing on August 21, 2000 (R. App. 27a), denied his claim on April 9, 2001, rejecting Endres' Title VII claim. R. App. 6a, 32a-33a. On May 8, 2001, Petitioner filed for judicial review of the Board's decision in Marshall Superior Court. R. App. 6a. On June 27, 2002, that court, finding the facts elucidated above (most of which had previously been found by the Board), denied the petition and held that Endres' termination did not violate Title VII, the First Amendment, or the Indiana Constitution. R. App. 6a, 19a-23a. Petitioner ultimately appealed that decision, and on August 27, 2003, the Indiana Court of Appeals affirmed, concluding that the Seventh Circuit's ruling on petitioner's Title VII claim collaterally estopped his pursuit of the same theory in state court. R. App. 9a. The Indiana Court of Appeals also ruled that petitioner's First Amendment and Indiana Constitution claims were without merit. R. App. 15a. Endres has petitioned the Indiana Supreme Court for discretionary review of his state court case.

## REASONS FOR DENYING THE PETITION

### I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS FROM OTHER CIRCUITS

In an effort to make this case look significant, petitioner asserts (albeit not until two-thirds of the way through the petition) that the decision below conflicts with decisions from the Fourth, Ninth, Tenth and Eleventh Circuits. However, none of the cases he cites represents any kind of conflict with the decision below.

1. Petitioner first cites *Balint v. Carson City*, 180 F.3d 1047 (9th Cir. 1999), as being in conflict, but there the only issue was whether a seniority system insulated a police department from an officer's Sabbath request. There was no "task-specific request for religious accommodation" (Pet. i.) at stake.

In *Balint*, furthermore, the department's argument was *not* that the officer's Sabbath request was unreasonable on its face, but that 42 U.S.C. § 2000e-2(h) (which permits the operation of bona fide seniority systems under Title VII) allowed the department to meet religiously based scheduling requests solely through its seniority system. *Balint*, 180 F.3d at 1051. The Ninth Circuit merely ruled that, while Section 2000e-2(h) protects seniority systems from being the basis for Title VII liability—and while *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), says that it would be undue hardship to force an accommodation that breaches a collectively bargained seniority system—seniority systems themselves do not inoculate employers from having to accommodate religiously based scheduling demands. *Balint*, 180 F.3d at 1051-53. The court additionally ruled that there was not yet any basis for inferring that a "shift-splitting"

accommodation would create an undue hardship by disrupting the department's seniority system. *Id.* at 1055-56.

Nothing in the *Balint* holding or reasoning conflicts with the decision below. The demand for accommodation had only to do with *when* the officer would work and had nothing to do with *what* laws the officer would enforce or what activities she would protect. There is simply no way to compare the reasonableness of the requests. Petitioner's demand not to perform certain lawful duties on a casino boat because of religious objections applies every day and is therefore more intrusive upon and has far greater potential to undermine the integrity of the Indiana State Police as an impartial law enforcement agency. *Balint* would not preclude outright dismissal of the same claim in the Ninth Circuit.[2]

2. Oddly, petitioner's second case that supposedly conflicts with the decision below actually *upheld* a police department's refusal to provide an officer with a Sabbath accommodation owing to the nature of police work. In *Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir. 1995), the court affirmed a magistrate judge's conclusion that "requiring the Department to grant shift exceptions . . . would result in a greater than *de minimis* cost in light of the public health, safety and welfare considerations associated with police work." *Id.* at 636. Thus, far from conflicting with the Seventh Circuit's decision in this case, *Beadle* actually lays the groundwork for it. If an officer's demand for a

---

[2] Petitioner also briefly cites, without discussion, *American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 775 (9th Cir. 1986). But that case involved the Postal Service, not a "paramilitary" or public safety employer, so there is no comparing the reasonableness of the demand for accommodation. Furthermore, the defendant apparently argued only that the accommodation provided was sufficient, not that the demand itself was unreasonable. *Id.*

scheduling accommodation need not be satisfied given the nature of police work, then surely the same would be true of a demand to be accommodated from enforcing certain laws and protecting certain activities.

Endres seizes on boilerplate language in *Beadle* to the effect that Title VII cases are fact-dependent. But while factual development may matter at some level of generality (*e.g.*, police department cases are factually distinguishable from, say, private employer cases), *Beadle* does not suggest that *all* demands for religious accommodation must be deemed *prima facie* reasonable. In light of *Beadle*, later cases in the Eleventh Circuit brought by police officers seeking Sabbath accommodations might reasonably be dismissed because, owing to the nature of police work, such demands will *always* impose greater than *de minimis* costs. The Seventh Circuit discussed this same concept in terms of the unreasonableness of the request rather than undue hardship, but under either vocabulary a police department need not be put to proof of undue hardship when the demand for accommodation is self-evidently untenable.

3. Petitioner again relies on a boilerplate recitation of the importance of fact sensitivity under Title VII in citing *United States v. City of Albuquerque*, 545 F.2d 110, 114 (10th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977). Like *Beadle*, however, *Albuquerque* upheld a city's refusal to accommodate a public safety employee's (a firefighter's) Sabbath request. *Id.* at 111-12. It is therefore especially fitting that *Albuquerque* was cited in *Beadle* to establish the notion that courts should consider the special duties of public safety employers when applying Title VII: "When the employer's business involves the protection of lives and property, 'courts should go slow in restructuring [its] employment practices.'" *Beadle*, 42 F.3d at 637 (quoting *Albuquerque*, 545 F.2d at 114). And while *Albuquerque* cited the City's shift-trading and liberal leave policies in concluding that the

City had done enough (545 F.2d at 113-14), there is no way to infer from this decision that the Tenth Circuit would require a police department to provide some accommodation for an officer who wished to avoid enforcing certain laws or protecting certain activities. Quite the contrary: The Tenth Circuit has properly shown the same solicitude toward public safety employers as the Seventh Circuit. These decisions are therefore consistent in both their approaches and outcomes.

4. Finally, petitioner cites the Fourth Circuit's unpublished decision in *Miller v. Drennon*, No. 91-2166, 1992 WL 137578 (4th Cir. June 19, 1992), which, like *Beadle* and *Albuquerque*, upheld a public safety employer's refusal to accommodate an employee's religious demand, in that case as it related to working conditions, but not tasks. Once again, petitioner's only basis for asserting a conflict with this case is *Drennon*'s recitation of the standard language concerning the fact-dependent nature of Title VII cases. But the Seventh Circuit's decision does not reject this notion of Title VII doctrine; it merely concludes that, so far as cases against police and other "paramilitary" or public safety employers are concerned, a demand to be exempted from performing specific tasks based on one's religion is unreasonable. Nothing in *Drennon* stands to the contrary.

* * * *

Petitioner describes his demand as a "task-specific request for religious accommodation." Pet. i. Yet there was no such request in any of his four main "circuit-split" cases. *Balint, Beadle* and *Albuquerque* all are Sabbath cases, and *Drennon* had to do with religiously offensive working conditions, not specific tasks. Furthermore, three of the four cases were resolved in favor of the government employers, and two expressly agreed that public safety employers face distinctive problems when it comes to demands for accommodation. Accordingly, there is nothing to the suggestion that the decision below conflicts with these cases.

## II. THE SEVENTH CIRCUIT PROPERLY HELD THAT PETITIONER'S DEMAND WAS UNREASONABLE, AND THE ISSUE IS NOT OF PRESSING NATIONAL CONCERN

The Seventh Circuit's decision that petitioner's demand not to work as a Gaming Commission Agent was unreasonable under Title VII fits comfortably within Title VII's text. Furthermore, it is based on sound policy that ultimately protects more religious freedom than the alternative, and petitioner has made no attempt to show that this issue arises frequently or is at the center of an important national debate.

1. To begin, it is important to bear in mind what the Seventh Circuit did not do. Petitioner repeatedly asserts or insinuates that the decision below created an "exemption" for paramilitary employers from Title VII's religious accommodation requirement. Pet. 7, 8, 9, 10, 11, 12, 13, 15, 18, 19. This assertion is wrong for at least two reasons.

First, the court nowhere construed Title VII to "exempt" the State Police (or other public safety or "paramilitary" employers), nor did it ever state that such employers are somehow "exempt" from anything. Rather, the court merely evaluated the nature of the State Police as an employer and concluded that it is not reasonable (as Title VII requires) for a Trooper to demand a task-specific religious accommodation. This no more "exempts" the State Police from Title VII than *Albuquerque* "exempts" fire departments that permit shift trading and liberal leave. 545 F.2d at 113. Both have only to do with what is reasonable.

Petitioner's argument also ignores the fact that similar issues have already percolated through the Seventh Circuit in two other cases, giving that court a breadth of experience concerning the unreasonableness of making a task-specific demand of a police agency, as distinct from the applicability

of Section 701(j) as an initial matter. *See Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998) (police department not required to honor demand not to guard an abortion clinic where there was opportunity for transfer); *Ryan v. United States Dep't of Justice*, 950 F.2d 458 (7th Cir. 1991) (FBI not required to permit an agent to choose assignments based on religious beliefs). Petitioner's lengthy demonstration of how to discern whether Congress intended to exempt law enforcement agencies from civil rights laws has no connection with the Seventh Circuit's actual rationale and holding.

Second, while petitioner suggests that this case renders unreasonable *all* accommodation demands made of "paramilitary" employers, the decision below holds only that "task-specific" demands for accommodation are unreasonable when made of the State Police. Pet. 19. It does not hold, for example, that a police officer's request for a Sabbath accommodation or a working conditions accommodation would necessarily be unreasonable. *But see Beadle,* 42 F.3d at 636-38 (holding that, regardless of what accommodations were made available, a police officer's Sabbath request would impose an undue hardship on his employer given the department's public safety mission). Petitioner has therefore overdramatized what is at stake.

2. The Seventh Circuit properly applied Title VII to the issue that it actually did address. The starting point is Section 701(j)'s text, which provides that employers must "reasonably accommodate" employees' religious beliefs and practices. 42 U.S.C. § 2000e(j). The statute *separately* provides that an accommodation need not be provided if it would impose an "undue hardship" on the employer. *Id.* As the Seventh Circuit has suggested, there may be some overlap between the two concepts concerning the cost (in dollars or otherwise) of the benefit, but with respect to "reasonableness" the inquiry has to do with the proportionality between the cost and the benefit rather than the impact

of the cost on the employer. *Cf. Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 542-43 (7th Cir. 1995) (distinguishing between "reasonable accommodation" and "undue hardship" in the context of the ADA) (cited at Pet. App. A5, B5).

Thus, if it is apparent that a demand for accommodation is unreasonable, *i.e.* out of proportion to its economic or social cost, there is no point in proceeding to the "undue hardship" inquiry. Section 701(j)'s text plainly permits an up-front analysis of whether the demand for accommodation is reasonable, and there is no basis for concluding that it requires an employer to prove undue hardship to rebut a self-evidently excessive demand for accommodation. The Seventh Circuit merely applied this commonsense (and text-based) understanding of Title VII when it deemed unreasonable petitioner's demand not to be assigned the duties of a Gaming Commission Agent.

Furthermore, petitioner has remarkably little to say in support of the reasonableness of his demand. He notes that the Seventh Circuit ruled as it did in part because "law enforcement agencies need the cooperation of all members" (Pet. 13-14, citing Pet. App. A8) and worries that this rationale might be extended to other employers, but he does not refute the rationale itself. In fact, in the midst of comparing his own situation to that of oath-bound health care workers, petitioner concedes that "[o]ne would hope that doctors, surgeons, nurses and other members of the health care professions . . . would not refuse to treat a patient because they disagreed with the patient's religious beliefs." Pet. 14-15. Indeed. But regardless whether the Seventh Circuit's rationale here would prevail in such contexts, petitioner himself sees the problem that makes his demand so unreasonable: there are just some employers, particularly those charged with public safety, whose circumstances make task-specific religious accommodations unreasonable.

To be sure, there is far more to the Seventh Circuit's reasoning than just the State Police's obvious need for employee cooperation. Underlying this need is the special obligation of "agencies such as police and fire departments designed to protect the public from danger" to remain neutral with respect to religious and other views in fulfilling their missions. Pet. App. A7-8, B6-7. It only makes sense that, to accomplish this duty, such agencies "may insist that *all* of their personnel protect *all* members of the public—that they leave their religious (and other) views behind so that they may serve all without favor on religious grounds." Pet. App. A7, B6. A rule that undermines rather than protects this understanding may lead to a "loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect." *Rodriguez*, 156 F.3d at 779 (Posner, C.J., concurring).

Petitioner says that an accommodation for him would not be playing favorites because he would be willing to "enforc[e] general vice laws at the casinos" (Pet. 14) even though he refuses to execute the duties of a Gaming Commission Agent. The state court record tends to refute this. R. App. 4a (finding that Endres refused even to work as a Gaming Commission Agent in nearby non-casino hotels and parking lots). But more fundamentally, petitioner does not explain why his willingness to enforce some laws but not others at the casino places the State Police in any less difficulty than if he refused to enforce *all* laws at the casino. Similarly, petitioner rejects a comparison between his situation and that of an officer who has religious objections to protecting prostitutes (calling the latter a "strawman" hypothetical, Pet. 6-7), but he offers no principled distinction. The point remains: It is unreasonable for a police officer to request accommodation from enforcing laws or protecting activities he finds religiously objectionable. This is a sound rule that fits easily within Title VII's text and meaning.

Petitioner protests that the decision below will lead to "dire consequences for religious freedom in the Seventh Circuit" (Pet. 13), but he cites no cases or other evidence to support this view. As a matter of logic, the Seventh Circuit's rule is actually more likely to protect religious liberty and pluralism than acceding to petitioner's demand would protect. If officers could pick and choose assignments depending on religious beliefs, those who engage in conduct that mainstream religions condemn may find themselves unprotected. Pet. App. A8, B7. Such a circumstance could chill the very right to individual belief and practice that petitioner seeks to vindicate. Perhaps this is why petitioner has been unable to establish that the permissibility of police officers' task-specific religious accommodation demands has become a serious national issue. And in the unlikely event that experience under the Seventh Circuit's rule bears out petitioner's concerns, the Court could consider the issue at that point. But there is no reason to do so now.

## III. THE PROCEDURAL POSTURE OF THIS CASE MAKES IT AN EXTRAORDINARILY POOR VEHICLE FOR CONSIDERING THE QUESTION PRESENTED

This case is an extraordinarily poor vehicle for addressing the sole question presented by the petition in view of the lurking question of whether Congress validly abrogated states' sovereign immunity with respect to religious accommodation claims—a question acknowledged, but avoided, by the Seventh Circuit below—and in view of the results of petitioner's two-track litigation strategy.

1. The Indiana State Police unsuccessfully moved to dismiss this case in the district court on the grounds that Title VII Section 701(a)'s abrogation of Eleventh Amendment immunity was invalid with respect to Title VII Section 701(j)

religious accommodation claims. On appeal, however, the Court of Appeals thought it "ma[de] sense" to decide whether Section 701(j) requires accommodation "[b]efore taking up the question whether § 701(j) is an exercise of § 5 powers." Pet. App. A4, B3-4.

Petitioner seeks review of asserted legal error in the determination that his demand for accommodation was unreasonable under Section 701(j), but he also acknowledges that the Eleventh Amendment abrogation issue remains unresolved. Pet. 20-23. What petitioner fails to consider, however, is that in *all* cases this Court must first be assured of its own jurisdiction. Here, this means that, in order to reach the issue presented in the petition, the Court must decide: (1) whether the Seventh Circuit properly concluded that the Eleventh Amendment issue did not go to jurisdiction (Pet. App. A4, B3-4); and (2) if the Eleventh Amendment issue is jurisdictional, whether Congress validly abrogated sovereign immunity with respect to religious accommodation claims. Petitioner, however, has not presented a question that encompasses these "analytically and factually" distinct jurisdictional issues. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32, 34 (1993) (per curiam); *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992); Sup. Ct. Rule 14.1(a).

Furthermore, even if this Court were to rule that the Eleventh Amendment issue is not jurisdictional and that petitioner has stated a Title VII claim, petitioner would still face a significant hurdle to presenting that claim on the merits. Either this Court or the Seventh Circuit would need to decide whether Congress properly abrogated Eleventh Amendment immunity for religious accommodation claims. So, a simple holding from this Court that petitioner has stated a claim would not directly set this case in motion on the merits.

In fact, if this Court were to grant review, the State Police would then urge as an independent ground for affirming the judgment of the Court of Appeals that the Eleventh Amendment bars petitioner's suit from going forward in federal court. More particularly, Congress's purported abrogation of Eleventh Amendment immunity for Section 701(j) religious accommodation claims is invalid. Requiring religious accommodation, as distinct from prohibiting religious discrimination, is incongruent and disproportionate to the authority granted to Congress under Section 5 of the Fourteenth Amendment, and is unsupported by any historical record showing the need for religious accommodation rights as against state government employers. *See City of Boerne v. Flores*, 521 U.S. 507 (1997); *see also Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).

2. Finally, petitioner's litigation against the State Police has proceeded on two separate tracks: a federal court claim seeking damages, reinstatement, and back pay, and a state tribunal claim seeking reinstatement and back pay. The State Police Board and the Marshall Superior Court rejected petitioner's Title VII claim on the merits, ruling that he failed to take advantage of reasonable accommodations available to him before he received his formal assignment. R. App. 21a-22a, 30a, 32a. Specifically, following the lottery, but before his formal assignment to the casino boat, petitioner could have requested a transfer to available non-casino positions; he could have sought a promotion to Corporal (which would have excluded casino duty); or he could have sought a volunteer to take his place. R. App. 3a, 15a, 21a-22a, 30a, 32a. These state tribunal factual findings may estop any contrary federal court findings, and they at least presage a federal court finding that the State Police provided Endres a reasonable accommodation under Section

701(j) before his formal assignment and did not need to offer him special treatment after he received his assignment.[3]

The parallel state court litigation, furthermore, is surely a procedural oddity that complicates this case and further undermines its utility as a vehicle for addressing the question presented. To be sure, the precise significance of the state court findings for any future federal court proceedings may not be absolutely clear (and a reversal here would undermine the collateral estoppel applied by the Indiana courts). But what is clear is that ultimately, even if petitioner convinces the Court that he has stated a cognizable Title VII claim, and even if the Eleventh Amendment issue is resolved in his favor, the facts that have come to light in petitioner's state court proceeding show that there is grave doubt that he can ultimately prevail on the merits of this lawsuit. So, again, petitioner would actually gain very little, if anything, from a grant of his petition.

---

[3] The Indiana Court of Appeals, to be sure, ruled that the Seventh Circuit's holding estopped petitioner's Title VII theory for reinstatement and back pay in state court, so it did not reach the merits of the Title VII issue. However, that court then rejected *on the merits* petitioner's claim under the Indiana Constitution "[b]ecause alternatives that did not burden [petitioner's] religious freedoms" were available that petitioner did not pursue. R. App. 15a.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Special Counsel
RAEANNA S. MOORE
Deputy Attorney General

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204
(317) 232-6201

**Counsel of Record*

*Counsel for Respondent*

Dated: March 19, 2004

# APPENDICES

## APPENDIX TABLE OF CONTENTS


A. Opinion of Panel of the Indiana Court of Appeals, August 27, 2003, in *Endres v. Indiana State Police*, No. 50A05-0210-CV-477 ..... 1a

B. Order of the Marshall Superior Court No. 1 On Petition For Judicial Review, June 27, 2002, in *Endres v. Indiana State Police*, No. 5001-0105-MI-09 ..... 19a

C. Decision of the Indiana State Police Board, April 9, 2001, in the Matter of the Appeal of Trooper Ben P. Endres of the Disciplinary Action Taken by Superintendent Melvin J. Carraway ..... 24a

D. Order of the United States District Court for the Northern District of Indiana, January 5, 2004 ..... 38a

# APPENDIX A

**FILED – August 27, 2003**
**Brian Bishop**
**Clerk of the Indiana Supreme Court**
**Court of Appeals and Tax Court**

ATTORNEY FOR APPELLANT:
**DAVID C. KOLBE**
Warsaw, Indiana

ATTORNEY FOR APPELLEE:
**STEVE CARTER**
Attorney General of Indiana

**DAVID L. STEINER**
Deputy Attorney General
Indianapolis, Indiana

---

**IN THE**
**COURT OF APPEALS OF INDIANA**

---

| | | |
|---|---|---|
| BEN ENDRES, Appellant, | ) | |
| vs. | ) | No. 50A05-0210-CV-477 |
| INDIANA STATE POLICE, Appellee. | ) | |

---

APPEAL FROM THE MARSHALL SUPERIOR COURT
The Honorable Robert O. Bowen, Judge
Cause No. 50D01-0105-MI-9

---

**August 27, 2003**

**OPINION – FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Ben Endres appeals an adverse judgment by the trial court that upheld the decision of the Indiana State Police Board terminating Endres' employment as an Indiana State Trooper after Endres failed to report to duty as a gaming agent.

We affirm.

## ISSUES

1. Whether, pursuant to Title VII of the Civil Rights Act of 1964, Endres was discriminated against because of his religious belief.

2. Whether Endres' state and federal constitutional rights of free exercise of religion were violated when his employment as an Indiana State Trooper was terminated for failure to report to duty as a gaming agent.

## FACTS[1]

Endres was hired as an Indiana State Trooper in 1991. After Endres was hired, Indiana legalized gambling, including riverboat casinos. Thereafter, the Indiana State Police (the "Department") entered into an interagency

---

[1] We note that a substantial portion of Endres' Appendix is utterly useless. The Appendix contains excerpts of what appears to be testimony and legal argument without any references identifying the proceedings, the forum, the context, or the speaker. The Table of Contents to the Appendix does not clarify the matters. We were able to complete our review because the State provided the transcripts in its Appendix. Accordingly, we direct counsel to Indiana Appellate Rule 50(A)(1) regarding Appendices in civil cases: "The purpose of an Appendix . . . is to present the Court with copies of only those parts of the record on appeal that are necessary for the Court to decide the issues presented."

agreement with the Indiana Gaming Commission whereby the State Police would provide Troopers as gaming agents at riverboat casinos to provide protection, to ensure public safety, and to enforce gaming laws.

In 1997, the Department developed a lottery system for assigning Troopers to riverboat casinos as gaming agents. As part of the system, a Trooper in the lottery could avoid an assignment to a riverboat casino by requesting a transfer or a promotion for which he/she is qualified before the actual gaming agent assignment is made. Also, a Trooper could solicit a volunteer to serve in his/her stead.

In September 1999, the Bremen Post where Endres was stationed was included in the lottery for the assignment of gaming agents. On October 12, 1999, the Bremen Post lottery was conducted and Endres was chosen first for assignment as a gaming agent. That day, he expressed to his immediate supervisor, Lt. Malayter-Brubaker, that his religious beliefs would foreclose his serving as a gaming agent on a riverboat casino. Lt. Malayter-Brubaker told Endres that, in all likelihood, he would not be assigned as a gaming agent because the Department anticipated that a sufficient number of volunteers would apply for the gaming agent positions.

On October 13, 1999, the day after the Bremen Post lottery was conducted, transfer requests for five assignments other than gaming agents were opened and remained open for approximately one month. Endres did not seek a transfer. Also, because Endres had taken and passed the requisite tests, he was qualified to request a promotion to the rank of corporal. Two corporal positions were available at the Bremen Post at the time, and State Police officials with a rank above Trooper did not have to serve as gaming agents. Endres did not apply for either position.

On March 2, 2000, Endres was assigned to the Blue Chip Casino and he was to report for duty on April 3, 2000. He learned of the assignment on March 2, 2000, and he then requested a meeting with Superintendent Carraway. He met with the Superintendent on March 13, 2000. Endres informed the Superintendent that his religious convictions would conflict with his assignment as a gaming agent. The Superintendent asked Endres whether he could work on the dock or other locations near the gaming boat, e.g., hotel lobbies, lounges, or parking lots. Endres responded that he could not become a gaming agent in any form, even a modified version. He then requested a transfer. The Superintendent explained that once an actual assignment is made, there could be no exceptions to that assignment.

On March 23, 2000, the Superintendent sent a letter to Endres stating:

> I enjoyed meeting with you and discussing your views on the gaming boats. I truly understand your convictions and believe that you have a very deep faith. Our job as law enforcement officers requires that we serve all the people of the State, not just those with whom we feel comfortable. No matter how offensive a person, situation or location may be to us, we have taken an oath to serve, protect, and uphold the laws of the State of Indiana.
>
> You asked if an exception could be made in your case. The answer remains no. I hope you understand the ramifications of your question and the [un]tenable position in which it places me and the agency. I've received

> several calls from chaplains on your behalf, and have explained to them as well that there can be no exceptions.
>
> Ben, I have heard a disturbing rumor about you not reporting to the gaming boat assignment as required. If this is true, I must inform you that your action would be insubordinate, and would set into place an internal investigation and possible disciplinary action. I hope that is not your intent. I believe you can meet your obligations to the State and the Indiana State Police and still maintain the integrity of your convictions.

(State's App. 290). Lt. Scott Schuh, the Acting Commander of the Bremen Post, received a copy of the letter on March 29, 2000. Lt. Schuh told Endres to report to the boat for his assignment as ordered. Endres informed Lt. Schuh that he would not follow the order.

On April 3, 2000, Endres failed to report for his assignment as a gaming agent. The Superintendent contacted Lt. Schuh on that day and was informed that Endres failed to report as ordered, but had commenced working at his former duties. The Superintendent directed Lt. Schuh to personally instruct Endres to report to the riverboat for his assignment. Lt. Schuh radioed Endres with the instructions. Endres responded "that he could not do it due to his religious convictions." (State's App. 112). After reiterating to Endres that his stance would result in an internal investigation and the possibility of discipline, Lt. Schuh took the steps required to commence the investigation. Lt. Schuh allowed Endres to continue working while the internal investigation was completed.

As a result of the internal investigation, Superintendent Carraway terminated Endres' employment with the Department for insubordination. After an appeal hearing, on April 9, 2001, the Indiana State Police Board ("Board") upheld the Superintendent's decision terminating Endres. On May 8, 2001, Endres petitioned for judicial review. On February 11, 2002, the trial court held a hearing wherein the parties presented arguments, and the evidence taken at the Board hearing was submitted. On June 27, 2002, the trial court entered its order detailing the evidence, determining that the Board's decision "is supported by substantial evidence and also supported by the law," and concluding that Endres failed to meet his burden to demonstrate that the Board's decision was invalid. (Appellant's App. 58). The court entered judgment for the State. On July 29, 2002, Endres filed a motion to correct error. On August 12, 2002, the court denied Endres' motion to correct error.

Subsequently, after the briefing period in the present case, the Seventh Circuit Court of Appeals entered its decision in Endres' separate federal action. See Endres v. Indiana State Police, No. 02-1247, 2003 WL 21480361 (7th Cir. June 27, 2003) (consolidated with Holmes v. Marion County Office of Family and Children, No. 02-1377, 2003 WL 21480361 (7th Cir. June 27, 2003)). The Seventh Circuit analyzed Endres' Title VII claim and determined that Endres failed to state a claim upon which relief could be granted.

## DECISION

Standard of Review

Courts have the power to review actions of state agencies taken pursuant to the Administrative Orders and Procedures Act ("AOPA"); however, the power of judicial review is limited. LTV Steel Co. v. Griffin, 730 N.E.2d 1251, 1257 (Ind. 2000). Courts may set aside only those agency decision that are:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (2) contrary to constitutional right, power, privilege, or immunity;
> (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (4) without observance or procedure required by law; or
> (5) unsupported by substantial evidence.

Id. (quoting Ind. Code § 4-21.5-5-14(d)). Agency decisions as to findings of fact are accorded deference; however, no such deference is accorded to the agency's conclusions of law. Id.

1. Title VII

As noted in FACTS, the Seventh Circuit Court of Appeals rendered a decision in the federal action commenced by Endres. See Endres, 2003 WL 21480361. The federal court outlined the appropriate analysis under Title VII, 42 U.S.C. § 2000e(j). Id. In general terms, an employer or prospective employer is required to make

reasonable accommodations for employees' religious observances and practices, unless such would cause undue hardship for the employer. Id. The court observed that the "reasonableness" component is distinct from the "undue hardship" component. Id. (citing Vande Zande v. Wis. Dept. Admin., 44 F.3d 538 (7th Cir. 1995)). The court then determined that, at its essence, Endres asserted "a claim of entitlement in the future to choose which crimes would be investigated and which potential victims protected." Endres, 2003 WL 21480361 (analogizing to the "same claim of entitlement" asserted by the plaintiff in Ryan v. Department of Justice, 950 F.2d 458 (7th Cir. 1991)). The court engaged in an extensive analysis of various strongly-held religious beliefs that, if exercised by law enforcement officers during the course of their duties, would thwart the most basic tenets of public protection: the neutral enforcement of laws and protection of potential victims. Endres, 2003 WL 21480361. The Endres court held that an accommodation that would allow a law enforcement officer to choose which laws to enforce and whom to protect would be "unreasonable [for] any police or fire department to tolerate." Id. at *4. The court determined that Endres' complaint failed to state a claim upon which relief could be granted. Id.

Turning to the present case, it is apparent that Endres presents the same Title VII claim in this case. He bases his state action Title VII claim upon the same concepts discussed and resolved by the Seventh Circuit in Endres. Although the State could not have urged res judicata prior to briefing this case, inasmuch as the federal court's decision had not been announced, the State's presentment of additional authority herein allows us to address such.

"The doctrine of res judicata consists of two concepts, claim preclusion and issue preclusion." Wedel v. American Elec. Power Serv. Corp., 681 N.E.2d 1122, 1131

(Ind. Ct. App. 1997), trans. denied. The concept of claim preclusion will apply when a final judgment on the merits has been rendered which then acts as a complete bar to a subsequent action on the same issue or claim between those parties and their privies. Id. Under the concept of claim preclusion, "all matters that were or might have been litigated are deemed conclusively decided by the judgment in the prior action." Id.

Issue preclusion, also referred to as collateral estoppel, acts to bar a subsequent attempt to relitigate the same fact or issue where that fact or issue was necessarily adjudicated in a former suit and is presented in a subsequent action. Mendenhall v. City of Indianapolis, 717 N.E.2d 1218, 1225 (Ind. Ct. App. 1999), trans. denied. "In that situation, the former adjudication will be conclusive in the subsequent action even if the two actions are on different claims." Id. However, issue preclusion does not extend to matters which were not expressly adjudicated. Id.

Issue preclusion is the branch of res judicata applicable here. In City of Anderson v. Davis, 743 N.E.2d 359, 365-66 (Ind. Ct. App. 2001), trans. denied, and Mendenhall, 717 N.E.2d at 1225-26, this court determined that the parties were collaterally estopped from raising issues in state court that had been finally determined in previous federal actions. Such is the case here. The complaint in federal court features the same parties, the same action, and the specific Title VII issue asserted by Endres in this case. Thus, the Seventh Circuit's decision on the Title VII issue bars Endres from relitigating that specific issue.

2. Federal and State Constitutional Claims

First, the State urges that Endres failed to raise federal and state constitutional religion claims until the filing

of his motion to correct errors, thereby waiving those issues. Although Endres' motion to correct error appears to contain the first clear attempt at consideration of the federal and state constitutions, given our precepts of notice pleading, the issues are properly before us.[2]

We turn first to the Indiana Constitution. In City Chapel Evangelical Free, Inc. v. City of South Bend, 744 N.E.2d 443, 445-46 (Ind. 2001), a case regarding the State's power of condemnation of church property, our supreme court outlined the tenets of the Indiana Constitution's pronouncements on religion and distinguished the federal provisions. The court noted three sections of "Article 1, the Bill of Rights, of the Indiana Constitution, which provide as follows:"

> Section 2. All people shall be secured in the natural right to worship ALMIGHTY GOD, according to the dictates of their own consciences.
> Section 3. No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience.
> Section 4. No preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent.

---

[2] In his petition for judicial review of the Board's decision, Endres stated: "the decision of the Indiana State Police . . . was contrary to Title VII of the Civil Rights Act of 1964 and its progeny together with a violation of the United States Constitution and Indiana Constitution each guaranteeing religious freedom and the free exercise thereof in that the State Police discharged Petitioner, Ben P. Endres, for the lawful exercise of his religious beliefs without making reasonable accommodations . . . ." (Appellant's App. 46).

Id. Endres cites the same three sections in his Brief.

The court in City Chapel observed:

> When Indiana's present constitution was adopted in 1851, the framers who drafted it and the voters who ratified it did not copy or paraphrase the 1791 language of the federal First Amendment. Instead they adopted seven separate and specific provisions, Sections 2 through 8 of Article 1, relating to religion. Clearly, the religious liberty provisions of the Indiana Constitution were not intended merely to mirror the federal First Amendment. We reject the contention that the Indiana Constitution's guarantees of religious protection should be equated with those of its federal counterpart and that federal jurisprudence therefore governs the interpretation of our state guarantees.

Id. (footnotes omitted). As to the protections afforded by Indiana's Bill of Rights and the State's ability to burden those rights, the court stated:

> [I]n Indiana the police power is limited by the existence of certain preserves of human endeavor, typically denominated as interests not 'within the realm of the police power,' upon which the State must tread lightly, if at all. Put another way, there is within each provision of our Bill of Rights a cluster of essential values which the legislature may qualify but not alienate. A right is impermissibly alienated when the State materially burdens one of the core values which it embodies.

Id. at 446 (quoting Price v. State, 622 N.E.2d 954, 960 (Ind. 1993) (citations omitted)).

While Endres does not specifically so state, his argument must be that the Department's rule requiring him to report for duty as a gaming agent, once he failed to request a transfer or a promotion, or to solicit a volunteer in his stead, materially burdened his right of religious freedom guaranteed by the Indiana Bill of Rights. We reject that notion.

Churches, and by implication the religious freedoms enjoyed by worshippers, are subject to reasonable regulations, not tantamount to alienation, by the State to the extent as might be required to promote the public health, safety, or general welfare. See City Chapel, 744 N.E.2d at 446; Church of Christ v. Metro. Bd. Of Zoning App., 175 Ind. App. 346, 351, 371 N.E.2d 1331, 1334 (1978). A core right would be materially burdened "[i]f the right, as impaired, would no longer serve the purpose for which it was designed." City Chapel, 744 N.E.2d at 447 (quoting Price, 622 N.E.2d at 960 n.7). "The 'material burden' analysis looks only to the magnitude of the impairment and does not take into account the social utility of the state action at issue." Id.[3]

---

[3] The State contends that Title VII "requires more than either the federal or state Constitution, and therefore, a ruling in favor of the Department on the Title VII issue precludes a finding that . . .Endres' constitutional rights were violated." Appellee's Br. at 23. The Title VII analysis requiring reasonable accommodations that do not present undue hardships to the employer differs from the "materially burdens" analysis under the Indiana Constitution in that the social utility of the burden is not considered. Put differently, the undue hardship to the employer considered of paramount importance under Title VII, is not a factor of the same significance under the Indiana Constitution analysis.

Here, the Department's interagency agreement with the Indiana Gaming Commission requiring Troopers to serve as gaming agents at riverboat casinos promotes the health, safety, and general welfare of the public. The use of Troopers to protect the public and enforce laws relating to gaming was a natural outgrowth of their duties as law enforcement officials. In explaining the neutral and unbiased approach required of law enforcement officials, the federal court in Endres stated:

> Law-enforcement agencies need the cooperation of all members. Even if it proves possible to swap assignments on one occasion, another may arise when personnel are not available to cover selective objectors, or when . . . seniority systems or limits on overtime curtail the options for shuffling personnel. Beyond all of this is the need to hold police officers to their promise to enforce the law without favoritism—as judges take an oath to enforce all laws, without regard to their (or the litigants') social, political, or religious beliefs. Firefighters must extinguish all fires, even those in places of worship that the firefighter regards as heretical. Just so with police.

---

Having said that, to the extent that our analysis under the Indiana Constitution parallels the Title VII discussion within Endres regarding the burdens to the parties, we believe our analysis to be appropriate under the standard outlined in City Chapel. Interestingly, within his Brief and without any analysis, Endres admits the nexus between Title VII and constitutional provisions by stating: "Clearly, for the most part, the constitutional jurisdiction has been defined, expanded, and supplanted by Title VII case law development. Title VII, however, is itself rooted in the original constitutional guarantees." Appellant's Br. at 17 n.1. The foregoing was apparently offered to explain Endres' brief analysis of the constitutional provisions.

> 'The public knows that its protectors have a private agenda; everyone does. But it would like to think that they leave that agenda at home when they are on duty—that Jewish policemen protect neo-Nazi demonstrators, [and] that Roman Catholic policemen protect abortion clinics . . . . We judges certainly want to think that U.S. Marshals protect us from assaults and threats without regard to whether, for example, we vote for or against the pro-life position in abortion cases.'

Endres, (quoting Rodriguez v. Chicago, 156 F.3d 771, 779 (7th Cir. 1998) (Posner, C.J. concurring)). Thus, the Department's actions served goals that would allow some limitations on the religious freedoms of those Troopers who find gaming inconsistent with their religious beliefs.

The impairment to Endres' constitutional religious freedoms was not so material or absolute inasmuch as he had alternatives until the final assignment was made on March 2, 2000. Endres acknowledged that he ignored opportunities to apply for promotions or seek transfers that would have resolved his dilemma. The Department's interagency agreement requiring Troopers to serve as gaming agents was well known in advance to Endres. Also, Endres knew that the Bremen Post, where he was stationed, was included in the gaming agent lottery as of September 1999. It is apparent that the mere existence of the interagency agreement did not burden Endres' religious freedoms, inasmuch as he did not formally express his concerns until his name was chosen first in the October 12, 1999 lottery for assignment of gaming agents. Notwithstanding his supervisor's assurance that, in the past, sufficient volunteers

had filled the gaming positions at the Blue Chip Casino, Endres knew that he would definitely be assigned first if the gaming positions were not filled by volunteers. Endres specifically chose not to request a transfer or a promotion to corporal, two of the available alternatives, until after his assignment to the Blue Chip Casino occurred on March 2, 2000. Accordingly, no burden to his religious freedoms would have occurred had he pursued an available alternative at the time his name was chosen as the first Trooper in line for assignment to the Blue Chip Casino. Because alternatives that did not burden his religious freedoms had been available to Endres until his official assignment, the assignment of Troopers as gaming agents did not materially burden Endres' religious freedoms under the Indiana Constitution, and his claim under the Indiana Constitution fails.

We turn to Endres' federal constitution claim. Endres does not state the portions of the federal constitution upon which he relies; instead, he offers two federal cases as analogous to his own: Indiana State Employees Assoc., Inc. v. Negley, 365 F.Supp. 225 (1973) (employees may not be discharged solely for political affiliation, or reasons motivated by racial or religious factors), and Thomas v. Review Bd. Of the Ind. Employment Sec. Div., 450 U.S. 707 (1981) (public welfare benefits cannot be denied on the basis of faith). Without significant analysis, Endres suggests that the cases are relevant because his termination was based upon his religious beliefs. The record discloses otherwise. The evidence demonstrates that Endres was terminated for insubordination for failing to report to his assignment once it was officially made on March 2, 2000.

Therefore, the trial court did not err in determining that the Board's decision was supported by substantial evidence, and the trial court's judgment is affirmed.

BAKER, J., concurs.

SULLIVAN, J., concurs with separate opinion.

**FILED – August 27, 2003**
**Brian Bishop**
**Clerk of the Indiana Supreme Court**
**Court of Appeals and Tax Court**

---

**IN THE**
**COURT OF APPEALS OF INDIANA**

---

| | | |
|---|---|---|
| BEN ENDRES, | ) | |
| Appellant-Defendant, | ) | |
| vs. | ) | No. 50A05-0210-CV-477 |
| | ) | |
| INDIANA STATE POLICE, | ) | |
| Appellee. | ) | |

---

## SULLIVAN, Judge, concurring

I concur but write separately to make an observation concerning the res judicata effect of the decision of the Seventh Circuit Court of Appeals rather than any res judicata effect of the litigation at the Federal District Court level.

The chronology of events as between the Marshall Superior Court and the Federal District Court is germane to our consideration of the issue. Endres filed his Petition for Judicial Review on May 8, 2001. On December 28, 2001, the Federal District Court for the Northern District of Indiana decided that Endres' Civil Rights claim could proceed in federal court. Thus, Endres was victorious, at least temporarily, at the federal court level. Accordingly, the federal trial court decision could not have a res judicata

effect adverse to the interest of Endres.[4] On June 27, 2002, the Marshall Superior Court entered its judgment denying relief to Endres under the Civil Rights Act. It was not until one year later, June 27, 2003, that the Seventh Circuit held that Endres, as a law enforcement officer, had no viable claim under the Civil Rights Act for the termination of his employment.

Be that as it may, the Seventh Circuit decision became final while the present appeal was pending before us. That decision, therefore, has res judicata implications to the decision we must make upon this issue before us. See 50 C.J.S., Judgments § 711 (1977) ("a decision of an appellate court will preclude any further action on the same matter between the parties . . . .")[5]

For the reasons stated I concur.

---

[4] The decision of the Federal District Court was not a decision upon the merits of whether Endres was entitled to recover under his civil rights action but could be argued to be a decision upon the merits of the issue finally decided by the Seventh Circuit, i.e., whether Endres had a viable civil rights claim at all. It was upon this issue that the Seventh Circuit reversed the Federal District Court.

[5] The termination litigation in the Marshall Superior Court was not further action because it occurred prior to the Seventh Circuit decision. However, it may be reasoned that the appeal before us is such further action and is subject to the application of the res judicata doctrine.

# APPENDIX B

**FILED – IN OPEN COURT**
**June 27, 2002**
**Janice S. Fisher**
**Clerk of Superior Court No. 1**
**Marshall County, State of Indiana**

STATE OF INDIANA
COUNTY OF MARSHALL
MARSHALL SUPERIOR COURT NO. 1
2002 CALENDAR TERM

| | | |
|---|---|---|
| BEN R.[sic] ENDRES, Plaintiff, | ) | |
| v. | ) | CAUSE NUMBER |
| | ) | 5001-0105-MI-09 |
| INDIANA STATE POLICE, Defendant. | ) | |

**ORDER**
**ON PETITION FOR JUDICIAL REVIEW**

**THIS MATTER** came before the Court on February 11, 2002, for hearing on the Petitioner's Petition for Judicial Review which was filed on May 8, 2001. The Plaintiff, **BEN R.[sic] ENDRES**, appeared in open Court in person and by counsel, David C. Kolbe. The Defendant, **INDIANA STATE POLICE**, appeared in open Court by Deputy Attorney General for the State of Indiana, Wayne E. Uhl.

Arguments were heard.

After arguments, the Court took this matter under advisement. After a review of the Petition, the Answer, the record of the proceedings, the arguments of counsel, and the law, the Court now FINDS that:

1. On April 19, 2001, the State Police Board issued a detailed written decision affirming the decision of the Superintendent of the State Police to terminate the employment of the Plaintiff.

2. The Plaintiff argues that the Board's decision was "arbitrary, capricious, abusive of discretion, unconstitutional, and otherwise not in accordance with law" and seeks reinstatement of his employment.

3. When reviewing the State Police Board's decision, this Court cannot reweigh the evidence nor substitute its judgment for that of the Board. Furthermore, this Court is bound by the agency's findings of fact if those facts are supported by substantial evidence. Finally, the Plaintiff bears the burden of demonstrating that the Board's decision was invalid.

4. The Plaintiff first contents that the Board's failure to issue an order within ninety (90) days as required by I.C. 4-21.5-3-27(g) divests the Board of jurisdiction over this matter. However, a failure to comply with that provision does not render a decision invalid.

5. Substantial evidence of probative value supporting the Board's decision to uphold the Plaintiff's termination of employment exists in the record of the proceedings. Specifically, from the record, one can conclude that:

A. In September of 1999, the Plaintiff was made aware that he would be part of a lottery for selecting a trooper for assignment on a casino boat.

B. The lottery was conducted on October 12, 1999, and the Plaintiff was selected for that assignment. The Plaintiff informed his district commander that he

had a conflict between that job and his religious beliefs. Although it was hoped that other officers might volunteer for that assignment and the district commander informed her troopers that it was "unlikely that anyone would be sent", it is clear from the Plaintiff's testimony that he understood that he could get orders to report to the casino boat for duty.

C. On October 13, 1999, transfer requests by troopers for different assignments within the department were opened and remained open for approximately two weeks. There were five openings available within the department which did not require an assignment on a casino boat. The plaintiff did not seek any transfer.

D. On October 18, 1999, promotional opportunities for two positions at the Plaintiff's district post were announced. Those opportunities did not require an assignment on a casino boat. Although the Plaintiff was eligible for those promotions, he did not apply.

E. On March 2, 2000, the Plaintiff was formally assigned for duty at the casino boat. Prior to that date, he had not discussed his conflicts with the Superintendent of the Indiana State Police nor any members of the executive staff of the State Police.

F. At a meeting with the Superintendent on March 13, 2000, the Plaintiff was informed that he was expected to report for the assigned duty on April 2, 2000. It was understood by the Plaintiff that he could be terminated for refusing the assignment. Only then did the Plaintiff ask for a promotion or a transfer. His requests were denied.

G. The Superintendent by a letter dated March 23, 2000, informed the Plaintiff that he had orders to report to the casino boat.

H. The Plaintiff did not report to his assignment as ordered.

6. The Board's decision to uphold the Plaintiff's termination was supported by the law. Specifically, from the record, one can conclude that:

A. The Plaintiff was not singled out for this assignment. The use of a lottery system by the State Police provided a neutral selection process.

B. The Plaintiff's religious objections to the assignment could have been avoided if he would have sought transfer to the different assignments then available or sought a promotion which was then available and for which he was eligible. Each of those alternatives are reasonable accommodations which were available and could have been made. However, the Plaintiff did not take advantage of those opportunities even though he had approximately five months to do so prior to receiving the official order concerning the assignment.

C. By failing to report for duty as ordered, he violated department rules concerning insubordination.

D. The department as a whole would be harmed if the Superintendent did not take action against insubordination.

7. Since the Board's decision is supported by substantial evidence and also supported by the law, I cannot reweigh the evidence nor impose my judgment for that of the Board. The Plaintiff has failed to meet its burden of demonstrating that the Board's decision was invalid.

**IT IS THEREFORE ORDERED** that the relief sought by the Plaintiff's Petition for Judicial Review is denied. Judgment is entered for the Defendant.

**SO ORDERED** this 27th day of June, 2002.

s/_____
Robert O. Bowen,
Judge, Marshall Superior Court No. 1

Distribution: David C. Kolbe, Counsel for Plaintiff
Wayne E. Uhl, Deputy Attorney General

# APPENDIX C

INDIANA STATE POLICE BOARD

IN THE MATTER OF THE APPEAL OF
TROOPER BEN P. ENDRES OF
THE DISCIPLINARY ACTION TAKEN BY
SUPERINTENDENT MELVIN J. CARRAWAY

Internal Investigation No. 00-024
Decision Date: April 9, 2001

APPEARANCES:

For the Petitioner, Ben P. Endres:
David C. Kolbe, Esq.
KOLBE & KOLBE
302 West Center Street
Warsaw, Indiana 46580

For the State:
Karen Freeman Wilson, Attorney General
By: David L. Steiner, Deputy Attorney General
219 State House
Indianapolis, Indiana 46204

By the Indiana State Police Board:
George D. Gardner, President (Presiding)

I. Brief Statement of the Case

Under an agreement between the Indiana Gaming Commission and the Indiana State Police Department, personnel of the Indiana State Police Department assist the Gaming Commission comply with its responsibilities under IC 4-33-4-3(7) by acting as, and being cross designated as, Commission Agents. In August of 1997 Melvin Carraway, Superintendent of the State Police Department, implemented

a new policy to fill vacancies in the ranks of personnel assigned to assist the Gaming Commission. Vacancies had been filled by probationary officers; however, following implementation of the new policy, the vacancies were filled by drawing from all troopers assigned to designated districts where riverboats were moored. Such assignments would be for a one (1) year tour of duty. In September of 1999 Superintendent Carraway extended this policy to include troopers assigned to certain counties in districts that were adjacent to districts where riverboats were moored, including Marshall and St. Joseph Counties in the Bremen District. The addition of these counties added Trooper Ben P. Endres of the Bremen District, among others, to a lottery system used to fill vacancies in the ranks of personnel assigned to the Blue Chip Casino not filled by volunteers. In October of 1999 the Bremen District conducted its lottery and Trooper Endres was selected first.

On March 2, 2000, due to a vacancy that had not been filled by volunteers, Trooper Endres received notification of his assignment to the Blue Chip Casino. Trooper Endres made an appointment with Superintendent Carraway for March 13, 2000, when he met with the Superintendent and reported that he could not report for the assignment because of his religious beliefs. Superintendent Carraway responded that he would have to report. On March 23, 2000, Superintendent Carraway sent Trooper Endres a memorandum informing him that no exception could be granted and that Trooper Endres' failure to report would meet with disciplinary action. Trooper Endres did not report to the Blue Chip Casino on April 3, 2000; instead, he reported to the Bremen District for duty. Superintendent Carraway made contact with the acting commander at the Bremen District, Lieutenant Scott Schuh, and had him relay a directive to Trooper Endres to report to the Blue Chip Casino. Trooper Endres refused, citing religious objections.

II. Procedural History and Issues

This Board is responsible for the review of disciplinary action taken by the Superintendent of the State Police Department pursuant to IC 10-1-1-6. On April 19, 2000, State Police Superintendent Melvin J. Carraway preferred written charges against Trooper Ben P. Endres. The charges were as follows:

Charge I – Refusal to Comply with a Written Order

> On or about April 3, 2000, Trooper Ben P. Endres refused to comply with the written order of Superintendent Melvin Carraway dated March 23, 2000, to report for a gaming boat assignment, when he reported to the Bremen District for duty instead, in violation of Police Rule 17, Section 17-3(A)15.

Charge II – Insubordination

> On or about April 3, 2000, Trooper Ben P. Endres refused to comply with the verbal order of Superintendent Melvin J. Carraway as relayed to him by Lieutenant Scott D. Schuh, the acting commander of the Bremen District, to report for his assignment at the casino, in violation of Police Rule 17, Section 17-3(A)3.

Trooper Endres appeared before Superintendent Carraway on April 26, 2000. Trooper Endres denied the charges. On April 27, 2000, Superintendent Carraway entered his Finding and Order that the evidence did support the charges against Trooper Endres and Superintendent Carraway entered the following order:

A. That Trooper Ben P. Endres is terminated from the Department effective April 27, 2000.

B. That Lieutenant Schuh pick up and inventory all Departmental property in the possession of Trooper Endres.

C. That proper entries be made in payroll, personnel and other records of the Department to carry out this Order.

Trooper Endres timely filed notice of his intent to appeal the disciplinary action which was assessed and imposed pursuant to the order of the Superintendent. The matter was properly before the Board pursuant to Indiana Code 10-1-1-6.

This matter was heard by David J. Allen, Pat J. Bennett, George D. Gardner, James W. Heyde, Robert B. McConnell, and Gwendolyn J. Morgan, the six (6) members of the Board of the State Police Department, on August 21, 2000. The Petitioner, Ben P. Endres, appeared in person and by counsel. The State Police Department appeared by counsel. Witnesses were sworn. The State's witnesses were Colonel Donald J. Brackman, Lieutenant Colonel L. Dean Petree, Trooper Donna M. Elam, Lieutenant Scott D. Schuh, Sergeant Glen H. Rabanus, and Superintendent Melvin Carraway. The Petitioner's witnesses were Lieutenant Joan E. Malayter-Brubaker (retired), Master Trooper Gregory A. Good, Nathan L. Stedman, and the Petitioner. Exhibits were received into evidence. The State introduced Exhibits 1 through 13 inclusive without objection. The Petitioner introduced Exhibit A. The Exhibits are described in the Addendum attached hereto and incorporated by reference. The Petitioner and the State submitted post hearing Briefs

and Reply Briefs at the Board's invitation. These Briefs are attached hereto.

The Board requested a Transcript of the testimony presented on August 21, 2000, be prepared. Where appropriate the Board has cited to the testimony of particular witnesses. Such citation, including page number, refers to that Transcript.

The facts material to the Superintendent's written charges being largely undisputed, the issue placed before the Board was whether or not Ben Endres' refusal to report for duty on a riverboat must be excused. Petitioner initially stated the issue for review as "[w]hether Trooper Benjamin P. Endres was wrongfully discharged and should be reinstated when the State Police failed to provide any reasonable accommodation for his religious belief." Officer's Brief, pg. 1. He later restated the issue as, "...whether the State Police was obligated to provide reasonable accommodations to Ben Endres after the issuance of the order to Ben to report to the gambling boat." Response Brief of Ben Endres, pg. 1.

III. Findings of Fact

The record of the proceedings consisting of the testimony of the witnesses, all exhibits received at the hearing and all other papers filed by the parties, and the whole having been duly considered, the following findings are made from the entire record:

1. The pertinent Police Personnel Rules of the State Police Department provide as follows:

> Police Rule 17, Section 17-3(A) . . . "Offenses by Employees against the authority of the Department shall include, but shall not be limited to:

3. Insubordination.

. . .

15. A violation of these rules, a department regulation, a standard operating procedure, or a written or verbal order of a commanding officer when such order is within the scope of the authority of the commanding officer."

2. The Indiana State Police Department has law enforcement responsibilities on riverboats in the State of Indiana; Superintendent Carraway implemented a lottery selection process in Districts where riverboats were moored in 1997 to fill vacancies on riverboats not filled by volunteers to avoid assigning inexperienced probationary officers Testimony of Col. Brackman, pp. 24ff; Testimony of Supt. Carraway, pp. 137ff.

3. Superintendent Carraway extended the lottery selection process to certain counties adjacent to districts in which riverboats were moored because of travel time and to ease concerns about availability of personnel. Testimony of Lt. Col. Petree, pp. 80ff; Testimony of Supt. Carraway, pp. 140-141.

4. Trooper Endres, who was assigned to the Bremen District, and worked in one of the added counties, knew of the policy change in September of 1999. Testimony of Ben Endres, pg. 202.

5. On the day that the Bremen District conducted its draw, October 12, 1999, Trooper Endres was told by fellow employees, and confirmed by his commanding officer, that he had been selected first. Exhibit 8; Exhibit 10, pp. 2 and 3;

Testimony of Lt. Malayter-Brubaker (ret'd), pg. 168; Testimony of Ben Endres, pp. 202-203.

6. On October 12, 1999, Trooper Endres expressed to Lieutenant Malayter-Brubaker his reservations about serving on a riverboat because of his religious beliefs about gambling. Testimony of Lt. Malayter-Brubaker (ret'd), pg. 168; Testimony of Ben Endres, pg. 203.

7. Trooper Endres was a trustee and youth sponsor at the Community Baptist Church of South Bend. One of his church's articles of faith, one that he personally subscribes to, is, "..that each member must remain separate from such ungodly practices as sodomy, pornography, fornication, adultery, gambling, the illegal use of drugs, and other such vices prominent in the world, system in which we live." Exhibit A, Testimony of Pastor Nathan "Bud" Stedman, pp. 189ff; Testimony of Ben Endres, pp. 200-201, and 208.

8. On October 13, 1999, voluntary inter-district transfers were opened, and on October 18, 1999, two vacancies for corporal at the Bremen District were opened. Exhibit 9, Testimony of Sgt. Rabanus, pp. 119ff.

9. Trooper Endres was eligible for transfer and he was eligible to compete for promotion to corporal, either of which would have removed his name from the lottery list, but he chose not to do either one. Testimony of Col. Brackman, pp. 71ff; Testimony of Lt. Col. Petree, pp. 78ff; Testimony of Sgt. Rabanus, pp. 118ff; and Testimony of Ben Endres, pp. 218ff.

10. Trooper Endres was notified of his assignment to the Blue Chip Casino effective April 2, 2000 by internal memoranda dated March 2, 2000. Exhibits 11 and 12; Exhibit 10, pg. 3; Testimony of Sgt. Rabanus, pp. 122ff.

11. Trooper Endres met with Superintendent Carraway on March 13, 2000, and expressed his reservations about his assignment to the Blue Chip Casino. Testimony of Supt. Carraway, pg. 142; Testimony of Ben Endres, pp. 206ff and 222-223.

12. Superintendent Carraway did ask Trooper Endres if he could work dockside rather than on the riverboat and Trooper Endres said that he could not. Testimony of Supt. Carraway, pp. 142 and 143.

13. At the conclusion of this meeting Superintendent Carraway told Trooper Endres that he would have to serve a year on the riverboat in compliance with existing policy, and he sent Trooper Endres a memorandum dated March 23, 2000, stating that a failure to follow his orders to report would meet with disciplinary action. Testimony of Supt. Carraway, pg. 146; Testimony of Ben Endres, pp. 210, 214-215, and 222-223.

III. Conclusions of Law

1. The State and the Petitioner emphasized the issue of reasonable accommodation of religious beliefs under Title VII of the Civil Rights Act of 1964, as amended, in their arguments and briefs. The Board reaches this issue in the context of the Indiana State Police Department's personnel rules followed in this matter. The charges that the State brings against the employee, insubordination and failure to follow a written or verbal order under Police Rule 17, which, require that the order must be issued "within the scope of authority of the commanding officer." The Board cannot find verbal or written orders that are contrary to the Department's legal responsibilities as a public employer

under the Civil Rights Act to be orders "within the scope of authority of the commanding officer."

2. Title VII requires an employer to reasonably accommodate an employee's religious observance or practice unless it can demonstrate that such accommodation would result in an undue hardship to the employer's business. Rodriguez v. City of Chicago, 156 F.3d 771, 775 (7th Cir. 1998).

3. A reasonable accommodation is a process or procedure that "eliminates the conflict between employment requirements and religious practices." Ansonia Board of Education v. Philbrook, 479 U.S. 60, 70, 93 L. Ed 2d 305, 107 S.Ct. 367 (1986).

4. Department procedures for transfer and promotion, Trooper Endres could have transferred to the Toll Road District, or been promoted to corporal, did afford him with the opportunity to eliminate the conflict between employment requirements and his religious practices, yet he chose not to take advantage of them when they were available.

5. By refusing to exercise these options, the resulting conflict was Trooper Endres' responsibility. As held in cases cited by the Petitioner and the State, Title VII only requires reasonable accommodation, not satisfaction of an employee's every desire. Rodriguez, 156 F.3d at 776 citing Wright v. Runyon, 2 F.3d 214 at 217 (7th Cir. 1993), cert. denied, 510 U.S. 1121, 127 L. Ed. 2d 394, 114 S.Ct. 1077 (1994).

6. Should the Indiana State Police Department be responsible for withdrawing assignments that conflict with officers' personal beliefs, after the assignment has been

given, the hardship on the Department is potentially much broader than just assignment of personnel on riverboats. Many assignments that police personnel are required to undertake by their employment requirements have the potential for being repugnant to the officers' personally. Borrowing from Judge Easterbrook's opinion in Ryan v. United States Department of Justice, a case cited by the State, the Indiana State Police, like the FBI in that case, may "choose to be stingy with exceptions lest the demand for them overwhelm it." 950 F.2d 458, at 462 (7th Cir. 1991).

7. Therefore, the Superintendent's written and verbal orders to Trooper Endres were lawful orders issued within the scope of authority of the commanding officer, Superintendent of the State Police Department, Melvin J. Carraway.

III. Determination Based upon Findings of Fact and Conclusions of Law

1. By reason of the findings above, the Board determines that the State has sustained the burden of proof for the charges preferred against Trooper Ben P. Endres and now finds that there is substantial evidence that:

a. On or about April 3, 2000, Trooper Ben P. Endres refused to comply with the written order of Superintendent Melvin Carraway dated March 23, 2000, to report for a gaming boat assignment, when he reported to the Bremen District for duty instead, in violation of Police Rule 17, Section 17-3(A)15, and that

b. On or about April 3, 2000, Trooper Ben P. Endres refused to comply with the verbal order of Superintendent Melvin J. Carraway as relayed to him

by Lieutenant Scott D. Schuh, the acting commander of the Bremen District, to report for his assignment at the casino, in violation of Police Rule 17, Section 17-3(A)3

and the State Police Board finds that Trooper Endres violated the rules of the Department as recited in the charges.

2. And further, by reason of the findings above, the Board finds that Trooper Endres' discipline by Superintendent Carraway, termination, was rationally related to the misconduct, and was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to the law. Therefore, the Board affirms the discipline imposed by Superintendent Carraway.

**IT IS THEREFORE ORDERED AND DIRECTED** by the State Police Board that the sanction imposed by Superintendent Carraway against Trooper Ben P. Endres should be, and hereby is, upheld.

s/__ s/__ s/__
Gardner, Heyde, and McConnell concurring.

s/__ s/__
Allen and Bennett dissenting.

Ms. Morgan did not participate in the decision on this matter.

APPROVED:

I hereby certify that the above is a true and correct copy of the decision of the Board as approved in this matter this 9th day of April, 2001.

s/_____
James W. Heyde, Secretary

Copies to:

Ben Endres
Certified Mail No. 7099 3400 0004 0682 8994
David C. Kolbe, Esq.
David Steiner, Deputy Attorney General

# ADDENDUM

State's Exhibits

| | |
|---|---|
| Exhibit No. 1 | Statement of Written Charges against Trooper Ben P. Endres |
| Exhibit No. 2 | Memo from Melvin J. Carraway to Trooper Ben P. Endres dated Aprl 27, 2000, on the Subject of Disciplinary Action – Finding and Order |
| Exhibit No. 3 | Interagency Agreement |
| Exhibit No. 4 | Job Description for Trooper-Gaming Enforcement Division |
| Exhibit No. 5 | Memo from Melvin J. Carraway to All Enforcement Personnel dated August 12, 1997, on the subject of Riverboat Assignments |
| Exhibit No. 6 | Memo from Melvin J. Carraway to All Personnel dated September 14, 1999, on the subject of Policy-Gaming Lottery Residency Requirements |
| Exhibit No. 7 | Memo from Donald J. Brackman to Melvin J. Carraway dated April 26, 2000, on the subject of Disciplinary Hearing – Trooper Ben P. Endres |
| Exhibit No. 8 | Memo from Joan E. Malayter-Brubaker to L. Dean Petree dated October 12, 1999, on the subject of Lottery Drawing for Blue Chip Gaming Boat |
| Exhibit No. 9 | Memo from L. Dean Petree to All Enforcement Personnel dated October 13, 1999, on the subject of Transfer Requests |
| Exhibit No. 10 | Transcript of Trooper Ben P. Endres' Interview conducted by Sergeant Glen Rabanus on April 10, 2000 |

| | |
|---|---|
| Exhibit No. 11 | Memo from Mark Mason to Joan Malayter-Brubaker dated March 2, 2000, on the subject of Lottery Activation – Blue Chip Casino |
| Exhibit No. 12 | Memo from Joan E. Malayter-Brubaker to Mark Mason dated March 2, 2000, on the subject of Lottery Activation – Blue Chip Casino |
| Exhibit No. 13 | Memo from Melvin J. Carraway to Ben Endres dated March 23, 2000, on the subject of Reassignment to Gaming Boats |

Petitioner's Exhibit

| | |
|---|---|
| Exhibit No. A | Memo from Dr. Bud Stedman to Glenn Rabanus dated April 11, 2000, on the subject of Constitution and Articles of Faith |

# APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

| | | |
|---|---|---|
| BENJAMIN P. ENDRES, JR., and UNITED STATES OF AMERICA, Plaintiffs, | ) | Cause No. 3:01-CV-0518 RM |
| vs. | ) | |
| INDIANA STATE POLICE, Defendant. | ) | |

ORDER

In accordance with the Court of Appeals' mandate [Docket No. 40], the court dismisses Benjamin Endres' complaint for failure to state a claim upon which relief may be granted.

SO ORDERED.

ENTERED: January 5, 2004

s/_____
Robert L. Miller, Jr., Chief Judge
United States District Court

cc: All Counsel of Record